Office - Supreme Court, U. S.
FILED
JUN 20 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

31440

WILLIAM H. KILLOREN, Trustee in Bankruptcy of Hamilton-Brown Shoe Company, a Corporation, Bankrupt, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

No. 195

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

LON O. HOCKER,
HARRY S. GLEICK,
Counsel for Petitioner.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
Petition for writ of certiorari	1-7
Summary statement of the matter involved	1
Basis of the jurisdiction of this Court	4
The question presented	5
Reasons relied on for the allowance of the writ	6
Prayer	6
Brief in support of petition for writ of certiorari	9-16
The opinions of the courts below	9
Jurisdiction	9
Statement of the case	10
Specification of errors	10
Summary of argument	10
Argument	11
Conclusion	16

Cases Cited.

Bird and Sons Sales Corporation v. Tobin, 78 F. (2d) 371, 101 A. L. R. 654	15
Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. Ed. 228, 12 Sup. Ct. 511	14
Kline v. Burke Construction Co., 260 U. S. 226, 67 L. Ed. 226, 43 Sup. Ct. 79	14
Kothe v. R. C. Taylor Trust, 280 U. S. 224, 74 L. Ed. 382, 50 Sup. Ct. 142	14
Kuehner v. Irving Trust Co., 299 U. S. 445, 81 L. Ed. 340, 57 Sup. Ct. 298	14
New York Dock Company v. Steamship Poznan, 274 U. S. 117, 71 L. Ed. 955, 47 Sup. Ct. 482	15
Pepper v. Litton, 308 U. S. 295, 84 L. Ed. 281, 60 Sup. Ct. 238	14
Trustees v. Greenough, 105 U. S. 527, 26 L. Ed. 1157	15

U. S. F. & G. Co. v. Bray, 225 U. S. 205, l. c. 217, 56 L. Ed. 1055, 32 Sup. Ct. 620 14

Warren v. Palmer, 310 U. S. 132, 84 L. Ed. 1118, 60 S. Ct. 865 15

Williams v. U. S. F. & G. Co., 236 U. S. 549, 59 L. Ed. 713, 35 Sup. Ct. 289 14

Statutes Cited.

Bankruptcy Act, Chapter X 1, 6

Bankruptcy Act of 1898, Section 64 (a) 10, 11

Bankruptcy Act of 1898, Section 238 ..... 10, 11

Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544 4

Chandler Act, c. 575, 52 Stat. 840 4

Chandler Act, Section 238 (Title 11, U. S. C. A., Section 638) 4

Judicial Code, Section 240 (a), as amended by Act of Feb. 13, 1925, 43 Stat. 938 (Title 28, U. S. C. A., Section 347) 4

Judicial Code, Section 265 14

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

WILLIAM H. KILLOREN, Trustee in Bankruptcy of Hamilton-Brown Shoe Company, a Corporation, Bankrupt, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	No.....

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of William H. Killoren, Trustee in Bankruptcy of Hamilton-Brown Shoe Company, a corporation, Bankrupt, respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

On April 19, 1939, the Hamilton-Brown Shoe Company filed its petition for a corporate reorganization under the provisions of Chapter X of the Bankruptcy Act (R. 10, 21).

James K. Vardaman and John W. Lake were appointed co-trustees and operated the business for a period of time, but on June 22, 1939, an order of adjudication was filed (R. 10, 21), and on July 7, 1939, William H. Killoren, petitioner here, was appointed Trustee in Bankruptcy for the purpose of liquidating and distributing the estate (R. 3).

Between April 19, 1939, and July 7, 1939, Vardaman and Lake, while acting as co-trustees, became indebted to the United States on account of taxes which had accrued during that period. These taxes, among other costs of administration involved during the same period, remain unpaid (R. 5, 10).

On February 29, 1940, after a hearing on the Trustee's petition for an order respecting the distribution and priority of payment, the Referee in Bankruptcy entered an order providing that the claims against the bankrupt estate's Trustee be classified and distribution be made by the Trustee out of funds in hand as follows (R. 7):

> "1. Claims allowed as trust funds in the hands of the trustee, and property held subject to reclamation petitions.
>
> "2. Fees and expenses allowed or to be allowed, and costs incurred, in the administration of this estate before the Referee in Bankruptcy, including Referee's fees and costs, fees and expenses allowed or to be allowed to William H. Killoren, trustee, fees and expenses allowed or to be allowed to the attorneys for the trustee, and any other fees, costs of court or administration that may be allowed in the regular bankruptcy proceedings.
>
> "3. All claims allowed or to be allowed as preferred as a result of operation of the business of the bankrupt subsequent to the filing of the petition for corporate reorganization in these proceedings, including on a parity all such claims for that period of operation (beginning with the filing of the petition for corporate

reorganization up to the time that William H. Killoren as trustee took charge of the assets), including tax, wage, merchandise, and service claims, and including allowances made by the United States District Judge for fees and expenses of the trustees appointed by him, of counsel for the bankrupt, and of counsel for the creditors' committee: it being intended hereby to include in this class all obligations incurred during the corporate reorganization proceedings in this estate and up to the time William H. Killoren as trustee in bankruptcy took charge of the assets.

"4. Claims allowed or to be allowed as preferred prior to the reorganization proceedings in this cause, and such claims shall be subject to further classification, distribution to be made as provided by Section 64 of the Bankruptcy Act of 1898, as amended.

"5. General claims against the estate."

A petition for review of this order was filed in the District Court for the Eastern District of Missouri, but the Government's petition was denied and the order of the Referee was confirmed (R. 9, 14).

The Government contended that its claim for taxes, incurred as a result of the operation of the business of the bankrupt subsequent to the filing of the petition for corporate reorganization, and accordingly classified in paragraph 3 of the Referee's order, should be on a parity with the costs of administration included in paragraph 2 of the Referee's order, i. e., that all costs of administration, whether incurred during the operation of the business of the bankrupt by the operating co-trustees or in connection with the liquidation in the so-called "regular bankruptcy proceedings," should be pari passu.

The Circuit Court of Appeals reversed the order of the District Court (R. 21) with directions to accord to the tax claim of the United States the parity claimed by it. The

effect of this decision is to eliminate the distinction made by the Referee between Class 2 and Class 3 claims. In due course petitioner filed his motion for rehearing, which was denied by the Court on May 20, 1941 (R. 31).

BASIS OF THE JURISDICTION OF THIS COURT.

Jurisdiction is claimed under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (see Title 28, U. S. C. A., Section 347).

An interpretation is sought of the Bankruptcy Act (Act of July 1, 1898, c. 541, 30 Stat. 544) as amended, and in particular of the Amendatory Act of 1938, known as the Chandler Act (Act of June 22, 1938, c. 575, 52 Stat. 840). Section 64 (a) thereof (Title 11, U. S. C. A., Section 104) relates to the subject of priority of debts in liquidation in bankruptcy proceedings, and provides in part that:

> "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; * * * the costs and expenses of administration, * * *."
>
> (Subsections 2 to 5, inclusive, relate to wages, expenses of creditors in obtaining a refusal or revocation of the confirmation of debtor's plans, taxes, and certain other debts entitled to priority; such provisions are not involved here.)

Section 238 of the Chandler Act (Title 11, U. S. C. A., Section 638), a section of Chapter X thereof, provides in part that:

> "Upon the entry of an order directing that bankruptcy be proceeded with—
>
> "(1) Where the petition was filed under Section 127 of this Act, the bankruptcy proceeding shall be

deemed reinstated * * *; or where the petition was filed under Section 128 of this Act, the proceeding shall thereafter be conducted, so far as possible, in the same manner and with like effect as if an involuntary petition for adjudication had been filed at the time when the petition under this chapter was filed, and a decree of adjudication had been entered at the time when the petition under this chapter was approved."

(Subsections 2 and 3 are not involved here.)

The judgment of the Circuit Court of Appeals, Eighth Circuit, was entered April 30, 1941 (R. 25); the petition for rehearing was denied May 20, 1941 (R. 31); thirty days stay of mandate was granted May 29, 1941 (R. 31).

THE QUESTION PRESENTED.

The question presented is whether, after an order of adjudication in a Chapter X proceeding, the Bankruptcy Court, in making an order of distribution, is required by Section 64 (a) of the Bankruptcy Act to treat all costs of administration upon a parity, or whether the Court, either under its equity power or under the provisions of Section 238 of the Act, or both, may order first paid those expenses necessarily incurred in the liquidation of the estate. Or in other words, in such a situation, are the provisions of Section 64 (a) to be applied absolutely and without flexibility, and is no effect to be given to the provisions of Section 238 of the Act, and to the wording thereof which seems to require that such provisions as are contained in Section 64 (a) control, not absolutely, but "so far as possible."

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals has decided an important question of Federal law which has not been, and should be, settled by this Court.

2. The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

There have been orders similar to the order entered by the Referee in this case entered in more than a score of other cases in the Eastern District of Missouri alone. A similar order was entered in the Western District in a case involving a very substantial amount; counsel in that case appeared by leave as counsel for amicus curiae in these proceedings (R. 19). The same question must necessarily arise in every case where the facts are similar to the situation before us here, i. e., where there has been an unsuccessful attempt to operate under Chapter X of the Bankruptcy Act, followed by an order directing that bankruptcy be proceeded with, and where the assets upon liquidation are found insufficient to pay in full all costs of administration, including those incurred prior to the said order.

PRAYER.

For the foregoing reasons, which are developed in further detail in the accompanying brief, your petitioner prays that a writ of certiorari issue out of this Court to the Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court, on a day to be determined, a full and complete transcript of the record of all the proceedings of such Court had in this cause, to the end that this cause may be reviewed and determined by this Court; that the final order and decree of

the Circuit Court of Appeals for the Eighth Circuit be reversed, and that the petitioner be granted such other and further relief as is proper.

WILLIAM H. KILLOREN,
Trustee in Bankruptcy of Hamilton-Brown Shoe Company, a Corporation, Bankrupt,
Petitioner,

By LON O. HOCKER,
HARRY S. GLEICK,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

WILLIAM H. KILLOREN, Trustee in Bankruptcy of Hamilton-Brown Shoe Company, a Corporation, Bankrupt, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	No.....

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS OF THE COURTS BELOW.

The District Court rendered no opinion; its order appears on Page 14 of the Record.

The opinion of the Circuit Court of Appeals, reversing this order, will be reported in 119 F. (2d) 364 (see Adv. Sheets June 9, 1941). It was filed on April 30, 1941, and appears at Page 21 in the Record.

JURISDICTION.

Reference is made to the jurisdictional statement contained in the petition in this Court.

STATEMENT OF THE CASE.

Reference is made to the Summary Statement of the Matter Involved, contained in the petition.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals, Eighth Circuit, erred in finding and holding that priority may not be allowed to expenses incurred in the administration of the estate by the Trustee in Bankruptcy, over expenses, and specifically taxes, incurred during the attempted reorganization before the appointment of the Bankruptcy Trustee.

2. The Circuit Court of Appeals, Eighth Circuit, erred in holding that Section 64 (a) of the Bankruptcy Act of 1898, as amended, controls absolutely the priorities to be given in distribution of the proceeds of a liquidation in bankruptcy, and requires without exception that all costs of administration be on a parity, in a case that originated as a Chapter X proceeding, in which was subsequently entered an order that bankruptcy be proceeded with.

3. The Circuit Court of Appeals, Eighth Circuit, erred in failing to give effect to Section 238 of the Bankruptcy Act of 1898, as amended, which requires only that, after the order directing that bankruptcy be proceeded with, the proceeding shall be conducted in so far as possible in the same manner and with like effect as if an involuntary petition for adjudication had been filed at the time when the petition under Chapter X was filed and the decree of adjudication entered at the time when the petition filed under Chapter X was approved.

SUMMARY OF ARGUMENT.

Since the law imposes duties upon the Courts of Bankruptcy which they must perform, such Courts, as Courts of Equity, have jurisdiction to make such orders as are necessary to enable them to perform their prescribed functions.

If the provisions of Section 64 (a) of the Bankruptcy Act are applied without flexibility in the liquidation of cases originating under Chapter X, the functions of Bankruptcy Courts will be paralyzed. Therefore, the Bankruptcy Court, both under its equity powers and under a saving clause, the "so far as possible" provision contained in Section 238 of the Act, has power to order first paid the expenses necessarily incurred in the liquidation of the estate.

ARGUMENT.

Since the law imposes duties upon the Courts of Bankruptcy which they must perform, such Courts, as Courts of Equity, have jurisdiction to make such orders as are necessary to enable them to perform their prescribed functions. If the provisions of Section 64 (a) of the Bankruptcy Act are applied without flexibility in the liquidation of cases originating under Chapter X, the functions of Bankruptcy Courts will be paralyzed. Therefore, the Bankruptcy Court, both under its equity powers and under a saving clause, the "so far as possible" provision contained in Section 238 of the Act, has power to order first paid the expenses necessarily incurred in the liquidation of the estate.

The Bankruptcy Court acquired jurisdiction to liquidate the estate of the bankrupt by virtue of the provisions of Article XII of Chapter X of the Bankruptcy Act of 1898, as amended. Section 238 thereof provides, in effect, that in such liquidation Section 64 (a) of the Act controls "so far as possible." In the present case the Circuit Court of Appeals held that the provisions of Section 64 (a) are absolute and inflexible and that strict adherence thereto is required.

It will be impracticable or impossible for Bankruptcy Courts to liquidate estates where assets are insufficient to pay all claims incurred during both periods (i. e., during

the period of operation under Chapter X and during the period of liquidation), if the law requires such absolute and inflexible equality.

Upon receipt of an order that bankruptcy be proceeded with, the Referee is required by Section 58 of the Bankruptcy Act to give notice of the first meeting of the creditors. General Order in Bankruptcy No. 24 requires that the Referee maintain a list of the claims filed; Order No. 26 requires that he maintain a record of his accounts; Section 58 of the Act requires further notices to the creditors. The trustee in bankruptcy in liquidating the estate must pay newspapers for notices and a surety company for his bond, the auctioneer for the expenses and commissions of the sale. The appraisers must be paid their fees. The law demands that the Referee and the trustee, in liquidating an estate, do certain things. The doing of those things involves necessarily the incurring of obligations to pay the incidental expenses, including the expense of the services of the Referee, the trustee, and counsel for the trustee. If the Referee be not empowered to authorize the trustee to pay for the doing of those things which the law requires to be done, estates in bankruptcy originating as Chapter X proceedings cannot be properly administered in those cases where the assets are insufficient to pay all costs of administration. For instance, the trustee must furnish creditors with information. To do so he must purchase stamps, for trustees' letters are not franked. Is the Referee authorized to reimburse the trustee only on a pro rata basis? Commissions must be paid to real estate men for selling the trustee's real estate. If the trustee shall not be permitted to pay such commission prior to the costs incurred during operations under Chapter X, but shall be required to pay them only on a pro rata basis, obviously the trustee will be unable to effect a sale of his real estate. And so on, ad infinitum.

Section 2 (a) of the Bankruptcy Act imposes upon

Courts of Bankruptcy certain obligations. Among other things, such Courts must cause the estates of bankrupts to be collected, liquidated and distributed. Controversies with reference thereto (the determination of which may involve expense) must be determined. Such Courts are, therefore, empowered to "make such orders, issue such process, and enter such judgments * * * as may be necessary for the enforcement of the provisions of this Act * * *." Under Section 2 (b) of the Act it is provided that such Courts are not, by special enumeration of powers, deprived of any power such Courts "would possess were certain specific powers not herein enumerated." A broad base for the many judicial declarations of the equity jurisdiction of Bankruptcy Courts is to be found in the first sentence of Section 2 (a) of the Act, by the terms of which the Courts are specifically invested with such jurisdiction "in equity as will enable them to exercise original jurisdiction in proceedings under this Act."

Unless the Bankruptcy Court be permitted to incur the expense of preservation and liquidation of the estate, and to pay that expense as a prior claim, it cannot function.

Congress must have intended that the language "so far as possible" of Section 238 have some significance. It was certainly designed to meet practical necessities. The situation confronting the Referee in Bankruptcy in the case here is confronting the Courts of Bankruptcy all over the country. Unfortunate operations under Chapter X have resulted in many situations such as this one, and the Courts must be given the power to liquidate the estates. The essential function of liquidation of bankrupt estates requires that the power be accorded the Bankruptcy Court to authorize its Trustees to pay their obligations in full.

It appears from the opinion that the Circuit Court overlooked the settled rule of statutory construction that when

a very literal interpretation of a statute will produce an unreasonable or absurd result, the reason of the law shall prevail over its letter. *Church of the Holy Trinity v. United States,* 143 U. S. 457, 36 L. Ed. 228, 12 Sup. Ct. 511. The Courts will properly assume that Congress did not intend to paralyze Bankruptcy Courts by withdrawing from them the power to administer, preserve, and liquidate bankrupt estates. It must follow that an interpretation which will preserve the processes of the Bankruptcy Court must be given, rather than a literal interpretation which will destroy the essential functions of the Courts. *U. S. F. & G. Co. v. Bray,* 225 U. S. 205, l. c. 217, 56 L. Ed. 1055, 32 Sup. Ct. 620; *Williams v. U. S. F. & G. Co.,* 236 U. S. 549, 59 L. Ed. 713, 35 Sup. Ct. 289; *Kothe v. R. C. Taylor Trust,* 280 U. S. 224, 74 L. Ed. 382, 50 Sup. Ct. 142; *Kuehner v. Irving Trust Co.,* 299 U. S. 445, 81 L. Ed. 340, 57 Sup. Ct. 298.

This rule of statutory construction is well illustrated by the holding of this Court in a case dealing with Section 265 of the Judicial Code. That statute expressly prohibits Federal Courts from enjoining proceedings in State Courts "except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Notwithstanding the express language of that statute, the Federal Courts in actions in rem have repeatedly protected their jurisdiction by exercising the power to enjoin State Court proceedings even though the Federal Court has not taken possession of the res. Notwithstanding the plain and express terms of the statute, Courts have presumed that Congress did not intend to deprive Federal Courts of the power to preserve and protect their own jurisdiction. *Kline v. Burke Construction Co.,* 260 U. S. 226, 67 L. Ed. 226, 43 Sup. Ct. 79.

This Court, in the case of *Pepper v. Litton,* 308 U. S. 295, 84 L. Ed. 281, 60 Sup. Ct. 238, brushed aside the con-

tention that the equity powers of the Court of Bankruptcy are abridged or restrained by the inflexible language of the Bankruptcy Act, in determining the rights of claimants, and held that, if equity compelled, the claim of one creditor might be subordinated to claims of other creditors. True enough, there was fraudulent conduct involved in the Pepper case, but relief from fraudulent conduct is not the only basis for the exercise of the equity power of the Courts.*

In the case at bar, the net effect of the order of the Referee, affirmed by the District Court, would be that the claims of the beneficiaries of the efforts of those who participated in the proceedings in bankruptcy proper should be subordinated to the claims of those who so participated because the latter have a superior equity. There is no fraud claimed in this case, but the superiority of the equity of the creditors of the bankruptcy proceeding as opposed to the creditors of the reorganization proceeding, is equally clear and well established. *Warren v. Palmer*, 310 U. S. 132, 84 L. Ed. 1118, 60 S. Ct. 865; *New York Dock Company v. Steamship Poznan*, 274 U. S. 117, 71 L. Ed. 955, 47 Sup. Ct. 482; *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157. The power of a liquidating court to pay in full the expenses incurred by it in the accomplishment of that liquidation springs ipso facto from the judicial possession of the property and is necessary in order that the Court may adequately care for the property. This doctrine, announced in *Warren v. Palmer*, was not alluded to by the Circuit Court of Appeals in its opinion.

---

*The Eighth Circuit Court of Appeals, in the case of *Bird and Sons Sales Corporation v. Tobin*, 78 F. (2d) 371, 101 A. L. R. 654, in the face of the express mandate of Section 65 (a) of the Bankruptcy Act requiring that "dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured," exercised the equity power of the Court to compel a creditor with an allowed claim to abide by a subordination agreement made prior to bankruptcy.

CONCLUSION.

We respectfully submit that the opinion of the Circuit Court of Appeals, for the reasons heretofore given, is unsound and establishes profound uncertainty in the field of bankruptcy administration. Our argument that the enforcement of the rule laid down by the Circuit Court of Appeals in this case will result in paralysis of administration is no mere rhetorical gesture. The Referee and trustee in such cases as this are faced with a situation where either they cannot pay to have those things done which the law requires to be done or, if they be paid for, the trustee subjects himself to a liability or surcharge upon his official bond for doing what the Circuit Court of Appeals has, in this case, held he cannot do. We submit that the question is one of vital and compelling importance. It is an outgrowth of the enactment of Chapter X of the Bankruptcy Act. Cases such as this are pending throughout the country. The question here involved has never been presented to the Supreme Court of the United States so far as we are advised. It is one of tremendous gravity, not merely to the officers of the Bankruptcy Courts, but to the general public. Its determination is extremely important to parties dealing with or rendering service to trustees in bankruptcy. We further submit that the decision is in conflict with the principles announced in the decisions of this Court heretofore referred to, and that therefore a writ of certiorari should issue as prayed for herein.

Respectfully submitted,

LON O. HOCKER,
HARRY S. GLEICK,
Counsel for Petitioner.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	4
Conclusion	8
Appendix	9

CITATIONS

Cases:	
Automatives Co., In re, 7 F. Supp. 614	7
Columbia Ribbon Co., In re, 117 F. (2d) 999	4
Ehrlich, In re, 3 F. (2d) 62	6
Englander, In re, 39 F. (2d) 931	6
Florida Nat. Bank of Jacksonville v. *United States*, 87 F. (2d) 896	4
Hennepin County Minn. v. *M. W. Savage Factories*, 83 F. (2d) 453	4
Humeston, In re, 83 F. (2d) 187	4
Lambertville Rubber Co., In re, 111 F. (2d) 45	4, 5
MacGregor v. *Johnson-Cowdin-Emmerich, Ind.*, 39 F. (2d) 574	4
Michigan v. *Michigan Trust Co.*, 286 U. S. 334	4
Missouri v. *Ross*, 299 U. S. 72	5
Pepper v. *Litton*, 308 U. S. 295	5
Southern Bell Telephone & Telegraph Co. v. *Caldwell*, 67 F. (2d) 802	6
State of Missouri v. *Earhart*, 111 F. (2d) 992, certiorari denied, 311 U. S. 676	4, 5
Warren v. *Palmer*, 310 U. S. 132	6
Statute:	
Bankruptcy Act of 1898, c. 541, 30 Stat. 544, as amended:	
Sec. 64 (U. S. C., Title 11, Sec. 104)	4, 9
Sec. 101 (U. S. C., Supp. V, Title 11, Sec. 501)	10
Sec. 102 (U. S. C., Supp. V, Title 11, Sec. 502)	5, 10
Sec. 106 (U. S. C., Supp. V, Title 11, Sec. 506)	11
Sec. 114 (U. S. C., Supp. V, Title 11, Sec. 514)	11
Sec. 127 (U. S. C., Supp. V, Title 11, Sec. 527)	12
Sec. 128 (U. S. C., Supp. V, Title 11, Sec. 528)	12
Sec. 236 (U. S. C., Supp. V, Title 11, Sec. 636)	12
Sec. 238 (U. S. C., Supp. V, Title 11, Sec. 638)	4, 13

Statute—Continued.
Bankruptcy Act of 1898—Continued. Page
Sec. 241 (U. S. C., Supp. V, Title 11, Sec. 641)..... 4, 14
Sec. 242 (U. S. C., Supp. V, Title 11, Sec. 642)..... 4, 14
Sec. 243 (U. S. C., Supp. V, Title 11, Sec. 643)..... 4, 15
Sec. 244 (U. S. C., Supp. V, Title 11, Sec. 644)..... 4, 15
Sec. 245 (U. S. C., Supp. V, Title 11, Sec. 645)..... 4, 15
Sec. 246 (U. S. C., Supp. V, Title 11, Sec. 646)..... 4, 16
Bankruptcy Act of 1938, c. 575, 52 Stat. 840..... 10, 11, 12, 13, 14, 15, 16

Miscellaneous:
General Orders in Bankruptcy:
General Order No. 10..... 7
General Order No. 35..... 7

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 195

WILLIAM H. KILLOREN, TRUSTEE IN BANKRUPTCY OF HAMILTON-BROWN SHOE COMPANY, A CORPORATION, BANKRUPT, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 20–25) is reported in 119 F. (2d) 364.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 30, 1941 (R. 25–26). A petition for rehearing was denied on May 20, 1941 (R. 31). The petition for writ of certiorari was filed on June 20, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether it was error for the Referee in Bankruptcy to allow priority to expenses incurred in the administration of the estate by the trustee in bankruptcy over expenses, including taxes, incurred during attempted reorganization before the appointment of the trustee.

STATUTE INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 9–16.

STATEMENT

On April 19, 1939, the Hamilton-Brown Shoe Company filed its petition for a corporate reorganization under the provisions of Chapter X of the Bankruptcy Act, and James J. Vardaman and John W. Lake were appointed co-trustees to effect the reorganization. However, on June 22, 1939, the Company was adjudicated a bankrupt, and on July 7, 1939, William H. Killoren was appointed trustee for the purpose of liquidating the estate and took charge of the assets to begin liquidation (R. 3–4, 10).

Between April 19, 1939, and July 7, 1939, Lake and Vardaman, while acting as trustees, had become indebted to the United States on account of taxes which accrued during that period. The amount of these taxes greatly exceeds that of the taxes which accrued while Killoren was acting as trustee (R. 5, 10).

On February 29, 1940, after a hearing on the trustee's petition from an order respecting distribution and priority of payment, the Referee in Bankruptcy entered an order providing that the claims against the bankrupt's estate be classified and that distribution be made by the trustee out of funds in his hands as follows (R. 7–8):

(1) Claims allowed as trust funds in the hands of the trustee, and property held subject to reclamation petitions; (2) fees and expenses incurred in the administration of the estate before the Referee in Bankruptcy after Killoren's appointment as trustee; (3) all claims allowed as preferred, including tax claims during the reorganization period, from April 19, 1939, to July 7, 1939; (4) claims allowed as preferred prior to reorganization proceedings; (5) general claims against the estate.

The Government took exception to the priority granted to the expenses incurred following the appointment of the trustee in bankruptcy. A petition for review of the order, however, was denied by the District Court for the Eastern District of Missouri and the order of the Referee was confirmed (R. 14).

The decision of the District Court was reversed by the Circuit Court of Appeals which held that the expenses described in (2) and (3), *supra,* should be treated equally. Petition for rehearing was denied (R. 25–31).

ARGUMENT

Taxes which accrue during the administration of a bankrupt's estate by a trustee in bankruptcy or during the period of an unsuccessful reorganization of the bankrupt's business are a part of the costs of preserving and administering the estate. *In re Columbia Ribbon Co.,* 117 F. (2d) 999 (C. C. A. 3d); *State of Missouri* v. *Earhart,* 111 F. (2d) 992 (C. C. A. 8th), certiorari denied, 311 U. S. 676; *In re Lambertville Rubber Co.,* 111 F. (2d) 45, 49 (C. C. A. 3d); *In re Humeston,* 83 F. (2d) 187 (C. C. A. 2d); *Hennepin County, Minn.,* v. *M. W. Savage Factories,* 83 F. (2d) 453 (C. C. A. 8th); *Florida Nat. Bank of Jacksonville* v. *United States,* 87 F. (2d) 896 (C. C. A. 5th); *MacGregor* v. *Johnson-Cowdin-Emmerich, Inc.,* 39 F. (2d) 574 (C. C. A. 2d). Cf. *Michigan* v. *Michigan Trust Co.* 286 U. S. 334, 344.

Such taxes thus fall within the first class of debts given priority by Section 64 (a) of the Bankruptcy Act of 1898, as amended (Appendix, *infra,* p. 9). The statute provides that when a reorganization proceeding is unsuccessful, it may be followed by a liquidation proceeding under the Bankruptcy Act. The latter is to be conducted "so far as possible, in the same manner and with like effect" as if a bankruptcy proceeding had been instituted at the time the petition for reorganization was filed. By the terms of Sections 238, 241–

246 of the Bankruptcy Act, as amended, when the assets are finally distributed, the judge may allow reimbursement for expenses incurred in the reorganization proceeding (Appendix, *infra,* pp. 13–14, 16). Such debts must then also be paid according to the order of priority set out in Section 64. *Id.,* Section 102 (Appendix, *infra,* p. 10).

Thus the taxes here are to be given the same priority as all other debts under class one of Section 64. That section indicates no order of payment within the class. We submit that where Congress has prescribed no order of priority within a class none should be allowed. *Missouri* v. *Ross,* 299 U. S. 72, 74; *State of Missouri* v. *Earhart, supra; In re Lambertville Rubber Co., supra.* Moreover, the 1938 amendment of this section, in which debts formerly grouped in three classes were placed in class one, constitutes recent evidence of the intention of Congress that debts within anyone class are to be treated equally.

Nor can the clear and complete provisions of the statute be varied or enlarged because of any equitable powers a court of bankruptcy may possess. *Pepper* v. *Litton,* 308 U. S. 295, on which petitioner relies, is not to the contrary. It was held there that the equitable powers of a bankruptcy court permitted it to disallow a particular claim in bankruptcy which, because of its fraudulent nature, should not in good conscience have

been paid on a parity with other claims. But this Court was there considering not the order in which claims should be paid, but simply whether a claim should be allowed. It clearly did not indicate that a bankruptcy court has the power to fix priorities for debts within the same class. And since *Warren* v. *Palmer,* 310 U. S. 132, involved a reorganization, which was being successfully carried out, the section establishing priorities in a bankruptcy proceeding was not applicable. Consequently, without regard to that section, this Court properly applied the rule that expenses which have contributed to the creation or preservation of a fund in the court's custody shall be paid before general disposition.

But section 64a does not permit the court to grant priority to one debt in that class over another, and this would be true even if the priority claimed by the petitioner would be recognized in equity. *Southern Bell Telephone & Telegraph Co.* v. *Caldwell,* 67 F. (2d) 802 (C. C. A. 8th). In circumstances similar to those here, proration among all claimants in a class has been approved. *In re Ehrlich,* 3 F. (2d) 62 (E. D. Pa.); *In re Englander,* 39 F. (2d) 931 (W. D. Pa.). In the few cases where courts have held that under their equity powers they can set up an order of payment not designated in the statute, they have confined the exercise of such powers to very narrow limits and such deviations would not support the peti-

tioner's claim here. See *In re Automotives Co.*, 7 F. Supp. 614 (N. D. Ohio).

Finally, the decision of the court below will not, as a practical matter, hinder effective administration of the estates of bankrupts. Expenses of the kind given priority by the referee here will share equally with all other expenses covered by class one in section 64, and in many instances the fund will be more than sufficient to pay all of these expenses.

Moreover, the persons charged with the administration of the estate and with conducting the bankruptcy proceeding are not always required to assume financial responsibility for the expenses incurred. General Order 10, issued by this Court, provides that before incurring any expense in publishing or mailing notices, or in traveling, or in procuring the attendance of witnesses, or in perpetuating testimony, the clerk, marshal, or referee may require, from the bankrupt, debtor, or other person in whose behalf the duty is to be performed, indemnity for such expense. Also in General Order 35 (4) it is provided in any case in which the fees of the clerk, referee, and trustee are not required by the Act to be paid by a debtor before filing his petition to be adjudged a bankrupt, the judge, at any time during the pendency of the proceedings in bankruptcy, may order those fees to be paid out of the estate; or may, after notice to the bankrupt, and satisfactory proof that he then has or can ob-

tain the money with which to pay those fees, order him to pay them within a time specified, and, if he fails to do so, may order his petition to be dismissed. The judge may also, pending such proceedings, both in voluntary and involuntary cases, order the commissions of referees, receivers, and trustees to be paid immediately after such commissions accrue and are earned. Consequently, these orders afford considerable protection to persons who assume duties under the Bankruptcy Act, and such protection makes for the expeditious and effective handling of bankruptcy matters. However, even if this were not so, the courts would still be without authority to allow the priority claimed here. Congress has covered the matter of priorities fully in a statute which is unambiguous, and any relief or changes desired must be granted by Congress.

CONCLUSION

The decision of the lower court is correct and not in conflict with any other decisions. Accordingly, the petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
J. LOUIS MONARCH,
LOUISE FOSTER,
Special Assistants to the Attorney General.

JULY 1941.

APPENDIX

Bankruptcy Act of 1898, c. 541, 30 Stat. 544, as amended:

SEC. 64. DEBTS WHICH HAVE PRIORITY.—a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; the filing fees paid by creditors in involuntary cases; where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of such recovery; the costs and expenses of administration, including the trustee's expenses in opposing the bankrupt's discharge, the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases and to the bankrupt in voluntary and involuntary cases, as the court may allow; (2) wages, not to exceed $600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or com-

mission basis, whole or part time, whether or not selling exclusively for the bankrupt; (3) where the confirmation of an arrangement or wage-earner plan or the bankrupt's discharge has been refused, revoked, or set aside upon the objection and through the efforts and at the cost and expense of one or more creditors, or, where through the efforts and at the cost and expense of one or more creditors, evidence shall have been adduced resulting in the conviction of any person of an offense under this Act, the reasonable costs and expenses of such creditors in obtaining such refusal, revocation, or setting aside, or in adducing such evidence; (4) taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof; * * *.

* * * * *

(U. S. C., Title 11, Sec. 104.)

CHAPTER X—CORPORATE REORGANIZATION

ARTICLE I—CONSTRUCTION

SEC. 101.[1] The provisions of this chapter shall apply exclusively to proceedings under this chapter.

(U. S. C., Supp. V, Title 11, Sec. 501.)

SEC. 102.[1] The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: *Provided, however,* That section 23, subdivisions h and n of section 57, section 64, and subdivision f of section 70, shall not apply in such pro-

[1] This Section, while appearing as an amendment to the Bankruptcy Act of 1898, *supra*, was added by the Bankruptcy Act of 1938, c. 575, 52 Stat. 840.

ceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters I to VII, inclusive. For the purposes of such application, provisions relating to "bankrupts" shall be deemed to relate also to "debtors," and "bankruptcy proceedings" or "proceedings in bankruptcy" shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 128 of this Act, and the date of adjudication shall be taken to be the date of approval of a petition filed under section 127 or 128 of this Act except where an adjudication had previously been entered.

(U. S. C., Supp. V, Title 11, Sec. 502.)

ARTICLE II—DEFINITIONS

SEC. 106.[1] For the purposes of this chapter, unless inconsistent with the context—

* * * * *

(9) "petition" shall mean a petition filed under this chapter by a debtor, creditors, or indenture trustee proposing that a plan of reorganization be effected;

* * * * *

(U. S. C., Supp. V, Title 11, Sec. 506.)

ARTICLE III—JURISDICTION AND POWERS OF COURT

* * * * *

SEC. 114.[1] Upon the approval of a petition, the jurisdiction, powers, and duties

[1] This section, while appearing as an amendment to the Bankruptcy Act of 1898, *supra*, was added by the Bankruptcy Act of 1938, c. 575, 52 Stat. 849.

of the court and of its officers, where not inconsistent with the provisions of this chapter, shall be the same as in a bankruptcy proceeding upon adjudication.

(U. S. C., Supp. V, Title 11, Sec. 514.)

* * * * *

ARTICLE IV—PETITION

* * * * *

SEC. 127.[1] A petition may be filed in a pending bankruptcy proceeding either before or after the adjudication of a corporation.

(U. S. C., Supp. V, Title 11, Sec. 527.)

SEC. 128.[1] If no bankruptcy proceeding is pending, an original petition may be filed with the court in whose territorial jurisdiction the corporation has had its principal place of business or its principal assets for the preceding six months or for a longer portion of the preceding six months than in any other jurisdiction.

(U. S. C., Supp. V, Title 11, Sec. 528.)

* * * * *

ARTICLE XII—DISMISSALS AND ADJUDICATIONS

SEC. 236.[1] If no plan is proposed within the time fixed or extended by the judge, or if no plan proposed is approved by the judge and no further time is granted for the proposal of a plan, or if no plan approved by the judge is accepted within the time fixed or extended by the judge, or if confirmation of the plan is refused, or if a confirmed plan is not consummated, the judge shall—(1)

[1] This section, while appearing as an amendment to the Bankruptcy Act of 1898, *supra*, was added by the Bankruptcy Act of 1938, c. 575, 52 Stat. 840.

where the petition was filed under section 127 of this Act, enter an order dismissing the proceeding under this chapter and directing that the bankruptcy be proceeded with pursuant to the provisions of this Act; or (2) where the petition was filed under section 128 of this Act, after hearing upon notice to the debtor, stockholders, creditors, indenture trustees, and such other persons as the judge may designate, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act, or dismissing the proceeding under this chapter, as in the opinion of the judge may be in the interests of the creditors and stockholders.

(U. S. C., Supp. V, Title 11, Sec. 636.)

* * * * *

SEC. 238.[1] Upon the entry of an order directing that bankruptcy be proceeded with—

(1) where the petition was filed under section 127 of this Act, the bankruptcy proceeding shall be deemed reinstated and shall thereafter be conducted, so far as possible, as if the petition under this chapter had not been filed; or where the petition was filed under section 128 of this Act, the proceeding shall thereafter be conducted so far as possible, in the same manner and with like effect as if an involuntary petition for adjudication had been filed at the time when the petition under this chapter was filed, and a decree of adjudication had been entered at the time when the petition under this chapter was approved;

[1] This section, while appearing as an amendment to the Bankruptcy Act of 1898, *supra*, was added by the Bankruptcy Act of 1938, c. 575, 52 Stat. 840.

(2) a trustee shall be appointed pursuant to section 44 of this Act and shall supersede any trustee previously appointed; and

(3) only such claims as are provable under section 63 of this Act shall be allowed, and claims not already filed may be filed prior to the expiration of three months after the first date set for the first meeting of creditors as provided in section 55 of this Act, or, if such date has been previously set, then prior to the expiration of three months after the mailing of notices to creditors of the entry of the order directing that bankruptcy be proceeded with.

(U. S. C., Supp. v, Title 11, Sec. 638.)

* * * * *

ARTICLE XIII—COMPENSATION AND ALLOWANCES

SEC. 241.[1] The judge may allow reimbursement for proper costs and expenses incurred by the petitioning creditors and reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in a proceeding under this chapter—(1) by a referee; (2) by a special master; (3) by the trustee and other officers, and the attorneys for any of them; (4) by the attorney for the debtor; and (5) by the attorney for the petitioning creditors. Such compensation of referees and trustees shall not be governed by sections 40 and 48 of this Act.

(U. S. C., Supp. V, Title 11, Sec. 641.)

SEC. 242.[1] The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and ex-

[1] This section, while appearing as an amendment to the Bankruptcy Act of 1898, *supra*, was added by the Bankruptcy Act of 1898, c. 575, 52 Stat. 840.

penses incurred in connection with the administration of an estate in a proceeding under this chapter or in connection with a plan approved by the judge, whether or not accepted by creditors and stockholders or finally confirmed by the judge—(1) by indenture trustees, depositaries, reorganization managers, and committees or representatives of creditors or stockholders; (2) by any other parties in interest except the Securities and Exchange Commission; and (3) by the attorneys or agents for any of the foregoing except the Securities and Exchange Commission.

(U. S. C., Supp. V, Title 11, Sec. 642.)

* * * * *

SEC. 243.[1] The judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred by creditors and stockholders, and the attorneys for any of them, in connection with the submission by them of suggestions for a plan or of proposals in the form of plans, or in connection with objections by them to the confirmation of a plan, or in connection with the administration of the estate. In fixing any such allowances, the judge shall give consideration only to the services which contributed to the plan confirmed or to the refusal of confirmation of a plan, or which were beneficial in the administration of the estate, and to the proper costs and expenses incidental thereto.

(U. S. C., Supp. V, Title 11, Sec. 643.)

SEC. 244.[1] Where a petition is filed under section 127 of this Act, the judge may allow, if not already allowed, reasonable compen-

[1] This section, while appearing as an amendment to the Bankruptcy Act of 1898, *supra*, was added by the Bankruptcy Act of 1938, c. 575, 52 Stat. 840.

sation for services rendered and reimbursement for proper costs and expenses incurred in the pending bankruptcy proceeding—(1) by a marshal, receiver, or trustee, as provided in subdivision g of section 48 of this Act, and the attorneys for any of them; (2) by the attorney for the petitioning creditors; (3) by the attorney for the bankrupt; and (4) by any other persons and the attorneys for any of them entitled under this Act to compensation or reimbursement in such bankruptcy proceeding.

(U. S. C., Supp. V, Title 11, Sec. 644.)

SEC. 245.[1] Where a petition is filed in a pending bankruptcy proceeding, the judge may allow reasonable compensation for services rendered and the proper costs and expenses incurred in such bankruptcy proceeding by a referee in bankruptcy. In fixing such compensation, the judge shall not be restricted by the provisions of section 40 of this Act.

(U. S. C., Supp. V, Title 11, Sec. 645.)

SEC. 246.[1] Upon the dismissal of a proceeding under this chapter, or the entry of an order adjudging the debtor a bankrupt, the judge may allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in such proceeding prior to such dismissal or order of adjudication by any persons entitled thereto, as provided in this chapter, and shall make provision for the payment thereof, and for the payment of all proper costs and expenses incurred by officers in such proceedings.

(U. S. C., Supp. V, Title 11, Sec. 646.)

---

[1] This section while appearing as an amendment to the Bankruptcy Act of 1898, *supra*, was added by the Bankruptcy Act of 1938, c. 575, 52 Stat. 840.

U. S. GOVERNMENT PRINTING OFFICE: 1941